IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

No. 1322

William Pardy and Albertine Hasler, *Appellants,* *vs.* **J. D. Hooker Company (a corporation),** *Appellee.*	FILED MAY - 7 1906 F. D. MONCKTON, CLERK

APPELLEE'S BRIEF.

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STATEMENT.

Appeal from a decree of the Circuit Court of the United States, for the Southern District of California, Southern Division thereof, in equity, entered and recorded December 1st, 1905; declaring United States letters patent No. 434,677, set forth in the bill herein, void in law, and that George Pardy, deceased, was not the inventor of the machine described in said letters patent. The action is for an injunction restraining defendant

from using a machine alleged to have been built in infringement of the patent, and for an accounting of profits.

The bill of complaint alleges that one George Pardy invented certain new and useful improvement in riveting machines, prior to August 20th, 1889, and that thereafter said Pardy died testate; and through his will, and an assignment set forth, the plaintiffs are owners of his rights and the rights of his estate. That after his death, and on the 16th day of December, 1889, William Pardy, as his executor, applied for letters patent of the United States on the alleged invention, and such letters accordingly issued on the 19th day of August, 1890, numbered 434,677. That on or about February 13th, 1895, the defendant, J. D. Hooker Company, was organized; and that thereafter, and before the commencement of this suit, the defendant has unlawfully used one or more pipe riveting machines, each containing and embracing the alleged invention, and has infringed upon the rights of the complainant secured by said letters patent, and has made and realized large profits therefrom, to an amount not specified. The prayer is for an injunction and accounting.

The answer denies that said George Pardy was the inventor of the alleged improvements in riveting machines; and alleges that the said Pardy was employed by J. D. Hooker to construct certain experimental machines embodying certain improvements in riveting machines invented by said Hooker and then and there divulged to said Pardy by said Hooker.

That said Pardy constructed experimental machines in performance of said employment, all embodying said

invention of Hooker; and upon completion thereof, Hooker suggested certain material additions thereto and changes therein, some of which were made by said Pardy, and some by others. That said Hooker paid for the materials used, and paid said Pardy for his services in full.

The answer further alleges that *said William Pardy, acting as executor of said George Pardy, deceased, seeking surreptitiously to appropriate said invention, or so much thereof as is embraced in the claims of the patent sued on, unjustly and unlawfully filed in the patent office of the United States an application for said patent, wherein he falsely alleged the said George Pardy to be the inventor thereof, and thereafter he surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by said J. D. Hooker, who was using reasonable diligence in adapting and perfecting said invention.* [Tr. pp. 15, 16.] The answer further alleges that said Hooker, with the full knowledge of said George Pardy, had several other machines similar to said first machines, constructed, and also one or more machines embodying some of the features of said machines; *and continuously used all of said machines, with the full knowledge of, and without any objection by, the said George Pardy.* [Tr. pp. 16, 17.]

POINTS AND AUTHORITIES

POINT I.

The defence in this case is not priority or anticipation, but that George Pardy was not the inventor but a mere mechanic employed to embody Hooker's invention in a machine; and that William Pardy surreptitiously and wrongfully obtained the patent. Therefore, the rule requiring the establishment of the defence beyond a reasonable doubt has no application. The case is like any other case of fraud, and a preponderance of evidence wins.

The evidence was taken before a special examiner and by depositions; and the case was heard upon oral argument at circuit before Mr. Justice Wellborn, who decided the case in favor of the defendant—appellee—and again *in extenso* before said judge, upon a motion for a re-hearing, on which he adhered to his decision; and thereupon decree was made and entered, that the said George Pardy was not the inventor of the subject of the letters patent, and that the letters patent are void in law. [Tr. pp. 17, 18.]

It should be observed at the outset, *that we are not confronted with the oath of George Pardy upon the application for the patent, that he was the inventor;* but with the oath of Pardy's executor, which is *based upon his conclusion*, drawn from alleged conversations with George Pardy, and upon letters from Hooker to Pardy, which, as will be seen hereafter, fall far short of sustaining such conclusion.

Every one of the cases cited by the learned solicitor for complainants upon this point are cases wherein it is admitted that the complainant invented something, but it is claimed that such invention was not new: that some one else was a *prior* inventor, and had *anticipated* the complainant. We concede that in such cases, the defense must be made out beyond a reasonable doubt.

The *raison d'etre* of the rule is obvious. Upon a question of priority or anticipation, two classes of questions are involved: 1st, do the records (United States or foreign) show any prior invention substantially covering the one in suit? and 2nd, did the defendant in fact invent the subject of complainant's patent (which *ex necessitate* the defense admits complainant invented) before the complainant made the invention?

As to the first, the determination depends on an examination of the official records of the patent office, made by the experts employed for the purpose by the government; and it is highly proper that their conclusion as to priority or non-priority should only be disturbed upon proof beyond a reasonable doubt.

As to the second, the contention of the defendant rests upon evidence of alleged facts, which, in the nature of the case could not have been brought to the notice of the patentee, and which usually rest in the memory of witnesses, dating years back; and which, consequently, the patentee has no means of contradicting. It is eminently proper that such evidence should be closely scrutinized; and that it should satisfy the judicial mind beyond a reasonable doubt. So we repeat:

The reason of the rule of reasonable doubt furnishes

the best test of its scope, and non-applicability to the case at bar.

The following cases well illustrate the reason of the rule:

Williams Shoe-button-fastener Co. v. Webb, 89 F. R. 982.

Questions of *invention and anticipation*. Hammond, J.

996 "A patent is of itself *prima facie* evidence of "its validity, and the defendant must show by proof *"that the patent office has erred on that score,* and "the proof must be conclusive against any fair "doubt on that point." Citing

West. El. Co. v. Howe Tel. Co., 85 Fed. 649.

Thayer v. Hart (improvement in necktie shields), 20 F. R. 693:

Question of priority.

"The complainant's patent *antedating* the de- "fendants', it was incumbent upon them to prove "beyond a reasonable doubt that theirs *was the* "prior invention. This they have by proof so posi- "tive that the plaintiff's counsel conceded for the "argument that the date of their invention was Jan. "15, 1877; eleven months prior to the filing of the "complainant's application. This date being fixed "the burden was transferred to the complainant to "satisfy the court by proof as convincing as that "required of the defendants that his invention pre- "ceded theirs. The rule in such cases is very strict. *"It is so easy to fabricate or color* EVIDENCE OF "PRIOR INVENTION and SO DIFFICULT TO CONTRA- "DICT, that proof has been required which does not "admit of reasonable doubt."

Facts not presumably in knoweldge of patentee.

Western El. Co. v. Home Tel. Co., 85 F. R. 649:

Question of *novelty*. Tomlin, J.

659. "The grant of letters patent is *prima facie* "evidence that the patentee is the first inventor of "the device described in the letters patent and of its "*novelty*. The burden of overcoming the *prima* "*facie* case made by the production of the patent is "upon the defendant, and the *defense of want of* "*novelty* must be clearly established before the court "will be justified in setting aside the patent on this "ground. Not only is the burden of proof to make "good *this defense* on the party setting it up, but it "has been held that every reasonable doubt should "be resolved against him."

In the barbed wire patent, 143 U. S. 275, so much relied upon by appellants, the only questions were *anticipation* and *novelty*.

The learned solicitor for appellants does not cite a single case, and, after an exhaustive search we have been unable to find one, where, the defense being surreptitious obtaining of letters patent, the rule of reasonable doubt has been even suggested.

The gist of this defense is that the patentee, knowing the defendant to be the inventor, fraudulently and secretly applies for and obtains the patent. The guilty *scienter* of the patentee is a question which obviously is not presented to the examiners in the patent office, and just as obviously rests in facts *known to the pretending applicant*. Taking the case at bar as an illustration: if George Pardy had applied for this patent, he would have done so knowing all the facts upon which the defendant relies; and, if these were not facts, the evidence would be easily within Pardy's reach. For, it is nowhere pretended that Pardy ever thought of a riveting machine before Hooker gave him his idea and employed him to embody it in a machine. On the contrary, it is admitted

that whatever Pardy did was upon the employment of Hooker. Thus the question narrows down to this: Did Hooker give Pardy the essential ideas, or did Pardy, after learning Hooker's want, give Hooker the essential ideas? And the answer to this question is found, not in the examination in the patent office, nor in the testimony of witnesses never seen or heard of by Pardy, of remote transactions; but *in the evidence of transactions between Pardy and Hooker. Hooker's defense depends upon proof of Pardy's knowledge.* We therefore insist that the reason of the rule of "reasonable doubt" does not exist in this case, and that the ordinary rule of "preponderance of evidence" applies, as in any ordinary case involving questions of fact. It should be added, that the evidence on both sides of this case is, that George Pardy's attention was first drawn to making riveting machines by Mr. Hooker's employment of him to make the machine in question. [Compl. wit. W. S. Pardy, Tr. p. 40; and Hooker's testimony.] Consequently the question before the court is simply this transaction between the two men. Did Hooker show Pardy, or Pardy show Hooker? Obviously this question was not before the patent office; and it has none of the elements of questions of priority or anticipation which give rise to the rule of reasonable doubt. It is just like any ordinary question of fact, to be proved by a preponderance of evidence.

POINT II.

The chronology of the case is a demonstration of the invalidity of the executor's claim to the patent. Complainants must stand or fall in the executor's shoes. If he had no rights, they have none.

We again call the attention of the court to the fact that the patent in suit was not obtained upon the oath of George Pardy, but upon that of his executor, *based upon alleged conversations with George Pardy which the executor did not vouchsafe to repeat* [Tr. p. 26, Ans. 17], and upon letters of Hooker *which do not even tend to support the claim.* The pertinency of this will appear from the chronology of the case.

Mr. Hooker first considered riveting by machine about January or February, 1887. [Tr. p. 93, A. 22.] Having conceived the idea of crushing the rivets by means of a heavy wheel, under pressure, passing over steel rivet sets held over the rivets by a steel bar having holes to receive the rivet sets; he communicated the idea to Mr. Pardy. Just when he told Pardy is not quite definitely fixed by the evidence; but it was certainly some time before October 8, 1887; for complainants' Ex. 5 [p. 174], Hooker's reply to Pardy's of Oct. 8, 1887, is that he is glad Pardy is sure he can make the machine. Prior to January 19, 1888, the first machine was shipped to Hooker's factory. [See letter, p. 182.] As early as February 17th, 1888, Hooker wrote to Pardy: "Again as to the machines I understand I am to own and control the patent upon them, paying you a fair and reasonable sum for all your time and labor, and what will be fair

and reasonable between us." This was notice to Pardy that Hooker claimed the right to patent the invention. Hooker testifies that Pardy wanted him to take out a patent; and, upon his declining, Pardy then said he, Pardy, could take out the patent in his own name, if Hooker wanted. Hooker then said, "How can you do that?" to which Pardy replied, "Well, if you don't object there is nobody to stand in the way of it. I can take out the patent in my name and assign it over to you if you want to and I make my fee." [Tr. pp. 116, 117, 118.] At some time George Pardy commenced specifications for a patent in his own name; but he never finished them—did not even get to the statement of claims. [Tr. pp. 57 to 66.] George Pardy died August 14, 1889, without having applied for a patent. In other words, this skilled mechanic and patent solicitor, knowing that Hooker claimed the invention, and having requested Hooker to let him take out the patent in Hooker's or his own name and been refused, allowed a year and eight and a half months to elapse without asserting any right whatever to the patent by applying for it, or otherwise. He never stated to the builders, Rix and Furth, that he was the inventor [Tr. p. 127, Q. 168.]; nor to his friend Edward E. Osborn, the patent solicitor who obtained the patent for the executor [Tr. p. 37, Q. 3 etc.]; nor to his friend Norman Selfe [Tr. p. 67], to whom he wrote, Oct. 22, 1887, that he was *making* a riveting machine,—not that he had *invented* one, and asks if a patent therefor would be valuable in New South Wales and other colonies. Not a single witness was produced to testify to a single conversation in which Pardy told anyone that he

had invented the machine. The testimony of executor Pardy and Miss Hassler fall very far short of being such evidence. Indeed, executor Pardy does not pretend to swear to anything but his alleged *inference from conversations* with his brother and from Mr. Hooker's letters. We submit that taken in connection with Hooker's written warning to Pardy, Pardy's knowledge of the patent law as a solicitor, his belief in the great value of the machine, and his failure to claim the invention to anyone, and the lapse of time between the shipping of the machine and Pardy's death; the unfinished and abandoned specifications in Pardy's name are an unanswerbale evidence of the fact that he knew he was not the inventor. *Further as to lapse of time.* Executor Pardy testifies that he had a conversation with Mr. Hooker in September following his brother's death about the alleged claim of the estate. On cross-examination he admits that he never discussed the matter with Hooker on any other occasion, and does not recall ever having written to him. [Tr. p. 30.] He dodges behind a convenient lapse of memory as to when he first learned Hooker had made a new machine, until, being pressed, he admits it was previous to November, 1893. This suit was not brought until 1904, although the patent was issued August 19, 1890. In other words, the executor allowed fourteen years to elapse after this alleged interview with Hooker, without a word to Hooker, written or spoken, and then, without other warning brought action against him; and during eleven of those years, he knew, according to his own admission, that Hooker had made the machine and infringed the patent, if it was valid. *During this long time*, misfortune overtook Hook-

er in the shape of fire which destroyed his evidence, letters from George Pardy and original sketches of the machine drawn by Hooker; and death, which sealed the lips of George Stellow, the trusted machinist who had stood by Hooker and the machine, until they perfected it and made it justify. [Tr. p. 139; as to Stellow, pp. 122, 121, 119, 114, 111, 110, 109, 108, 106, 105, 104, 103, and Exh's. 19, p. 184; 20, p. 185; 22, p. 187; 24, p. 188; 25, p. 189.] We submit that the conduct of the complainants is open to but one construction. *They lay silent and dormant fourteen years, because they knew that this patent, granted, not upon the oath of Pardy the mechanic employed to embody Hooker's invention in a machine, but upon the oath of the executor of the estate, who says he inferred that "the question of the future con-"trol of the patent riveting machine was an open ques-"tion between Hooker and George Pardy* [Tr. p. 28, Q. "24.], *could never stand judicial scrutiny."* And now with Hooker's main guns forever silenced, they sally bravely forth, armed with this alleged patent and boasting its sacredness in the eye of the law and quoting well known opinions on presumptions and degree of proof, and ask the court to say that John D. Hooker is a thief and rank perjurer. For that is what it means. There is no half way ground in the case. Either Mr. Hooker deliberately built the machine knowing he was infringing a valid patent [Tr. p. 83], and then sought to escape judgment by the most deliberate, detailed and sustained prejury; or he, as inventor, lawfully used his invention and truthfully defended his rights. The learned judge at circuit refused to find the defendant guilty of

these wrongs, upon the gauzy evidence adduced by the complainants. He laid great stress, we may be permitted to say, upon the fact that the patent was not founded on the oath of George Pardy, but of his executor. He regarded the fact that Pardy, mechanic, inventor, patent solicitor, evidently impressed with the value of this machine, had never even finished specifications, much less applied for a patent for a period of two years, as of most telling weight; and could not see that the fourteen years delay of the executor and other complainant in notifying Mr. Hooker of their claims lessened its weight.

We submit that these lapses of time, under the circumstances of the case, are alone sufficient to warrant the decision of the learned Circuit judge.

POINT III.

The single witness called by complainants to testify to the res gestae, Sam Gowan, is shown by the record to have sworn falsely as to who perfected the machine after it failed to justify. There being no other evidence to contradict defendant's testimony that he and his foreman Stellow perfected the machine, the defendant's evidence on this point is conclusive.

Sam Gowan was a foreman in the pipe factory, *and an enemy to the defendant's riveting machine. The first suspicion was evidently cast upon him by George Pardy himself, before the first machine had arrived in the factory.* This is conclusively shown by complainants' Ex. 6. [Tr. p. 175.]

"Los Angeles, Cal., Oct. 14, 1887.

"George Pardy, 402 Mty. St., San Francisco:

"Dear Pardy—Herewith please find C. K. to your or-"der for 300. XX the strip of iron with holes will go by "express tonight to Robbins. Don't let Robbins into your "confidence, he is after this very thing. *You are quite "right in your suspicion as to the matter of Sam's leak-"ing. He will work against everything to take place of "men.* Hence it will hardy do *to trust anything what-"ever to him. He will make the machine a failure if he "can, depend upon that—we wont let him however.* The "Jardine punch has been made exactly to conform to the "Robbins punch—so only one strip will be sent. Doyle "has not shown up.

"Yours truly,
"HOOKER."

Again, complainants' Ex. 21 [Tr. p. 186]:

"Los Angeles, Cal., Mch. 24, 1888.

"Dear Pardy:

"All our men are on the rampage except yard men, "it is both on a|c of wages and machine. I am running "machine on 6-in. pipe. *Sam tried his best to make a bad "job of it finds fault with it & is an intense enemy.* The "machine does well and when we get one or rather two "or three more going it will make a bulwark they cannot "overthrow. * * * *Sam is going to buck us Monday—"We will let him out I think.* * * *

"Faithfully,
"JNO. D. H."

Again, complainants' Ex. 22 [Tr. p. 187]:

"Los Angeles, Cal., Mch. 29, 1888.

"Dear Pardy:

"The prime cause of the strike is the machine. The "round seamers combined not to put the machine pipe "together—they had it all cooked for us, but we will "carry our point. Have taken on a new crew and are "getting on fairly well. *Sam did his level best against*

"us and is out—wants to get back but I am afraid of "him. * * *

"Yours faithfully,
"J. D. HOOKER."

These letters are part of the *res gestae*, and give the true history of the case. They were written to keep Pardy posted as to the success of the machine, and the attitude of the factory hands toward it. They show that Pardy's suspicion of Sam Gowan was well founded.

In the face of this evidence, Gowan's testimony that he and Pardy perfected the machine together, and that he was in charge of the machine, is preposterous, and utterly destroys his credit. Further, the letters completely corroborate Hooker's testimony. [Tr. p. 158, 159, 160.] He says:

(Answer 91.) "Sam Gowan was the superintendent, "and he is the man that led the strike and led the men "out of my works, and was an enemy to the machine." (Q. 93) "And he is not now with you? A. No sir. "Q. Well what were his relations towards you when "he left there? A. Amicable I guess. I never allowed "him to handle the machine, and he never did one turn "with it. 'Amicable'—if leading a strike was amicable. "He went out, led a strike. Q. Was he discharged at "the time he struck? A. Yes sir. Q. And he never re-"turned? A. No sir." The witness continues that Gowan had nothing to do with the experiments with the machine and reiterates [Tr. p. 160]: *He had nothing to do with the management or handling of the machine. I dared not trust him.* As before observed, this testimony tallys exactly with Hooker's letters written to

Pardy at the time of the transaction, and is obviously true.

The motive for Sam Gowan's false testimony is not far to seek. The memory of the establishment by Hooker of a machine "to take place of men;" the memory of George Stellow's fidelity to Hooker and consequent preferment over Gowan; the memory of the futile strike and Gowan's discharge, still rankled in the breast of this man as he was sworn to tell the truth. He thought he saw his chance to get square with Hooker, the inventor and mentor of this labor-antagonizing machine, and the man who humbled and discharged him; and with the same bravado and disregard for duty which led him to lead a mutiny against machine and master, he testified falsely as he did. We submit that as a witness in this case, Sam Gowan is *down and out*. It is a desperate case indeed, in which counsel feel compelled to call such a witness.

But it is important in this connection to note another fact which these letters of Mr. Hooker to Mr. Pardy conclusively establish. Mr. Hooker testified in detail to various material changes in the original machine which he and George Stellow, the dead machinist made. — Would that poor Stellow had survived as long as the letters! — Hooker also testified that Stellow remained faithful to him and his machine. The only evidence adduced to contradict Mr. Hooker on this point is that of striker Gowan [Tr. 136]: "Q. 31. Were any "changes made in that first machine by. Mr Stellow? A. "No. Q. 32. Were any changes made on any of the "pipe riveting machines that were used by Mr. Hooker

"by Mr. Stellow? A. Not only just simply in the adjust-
"ments."

Let us examine the letters to Pardy again. In the letter of March 19, 1888 [Ex. 19, p. 184], we find the statement: "George is running her at the rate of 25 joints "per hour today—the work is O. K."

Again, Mch. 16, 1888 [Ex. 20, pp. 184-5]: *"George "has made two new ones but they are too high so ma-"chine does not set rivet down as it should. Has gone "back to the old ones which he has finished down.* The "work is finest yet," etc.

Again, Mch. 28, 1888 [Ex. 21, p. 186]: "I have a "man to take George's place if he gets knocked out."

Again, Mch. 29, 1888 [Ex. 22, p. 187]: "The new sets "work fine. George is highly pleased with them * * * "—he says the joint slides a trifle sometimes."

Again, Apl. 11, 1888 [Ex. 24, p. 188]: "George is "doing good work with this riveter though he breaks "too many sets by crushing it down too hard. I have "him now where he will do well, I am sure."

These letters conclusively show that the adaptation and perfecting of the machine were being done by Mr. Hooker and the machinist, George Stellow. And there was every reason why Mr. Hooker should have done as he says [Tr. p. 108]: "My object in bringing Mr. Pardy "down was that he should confer with Stellow, and see "what we had accomplished with that other machine; "and therefore I brought him down. And we went over "the method of putting in a machine to rivet in double "rows, and then he went back with the gatherings we "had given him of the way we wanted the thing to do "and put the machine together."

It were useless to multiply details. With Sam Gowan hopelessly discredited and contradicted, and not a shadow of evidence in the case even tending to contradict Mr. Hooker's testimony that the first machine would not work until he and Stellow made the requisite changes, perfected it and made it work; we submit that the defendant has demonstrated that George Pardy's attempt to embody the defendant's invention in a practical machine did not succeed. Success was achieved by Hooker and his machinist Stellow.

POINT IV.

The account given by Mr. Hooker of his invention of the riveting machine bears the stamp of truth on its face. He undoubtedly conceived the idea, and employed Mr. George Pardy as a skilled mechanic to make drawings and superintend the construction of a machine embodying the invention. Mr. Hooker was, therefore, the inventor, and Mr. Pardy was not entitled to a patent on the machine.

1. We call attention at the outset to the fact that Hooker had had long and full experience in the art of cold riveting sheet steel pipe for irrigation purposes; but practically no experience in general mechanics. He knew what he wanted to do, and how he wanted to do it, but had not the knowledge of the breaking strain of materials, requisite power, and the like purely mechanical matters, to fit him to make working drawings and superintend the details of construction. On the other hand, Pardy was a mechanical engineer and patent solicitor,

having the requisite knowledge to make such calculations and drawings, and superintend the details of construction; but knew nothing about this cold riveting art as practiced.

2. "An employer who conceives the result em-"braced in an invention, or the general idea of a "machine upon a particular principle, and in order "to carry his conception into effect necessarily em-"ploys manual dexterity, or even inventive skill, "in the mechanical details and arrangements, is nev-"ertheless the inventor and entitled to a patent as "against the servant who was the mere instrument "through which he realized his idea."

King v. Gedney, Fed. Case No. 7,795;

1 McArthur, Pat. cas. 443;

Wellman v. Blood, Fed. Case No. 17,385;

1 McArthur Pat. Cas. 432.

"Where an employer has conceived the plan of an "invention, and is engaged in experiments to perfect "it, no suggestion from an employe not amounting "to a new method or arrangement, in itself a com-"plete invention, are sufficient to deprive him of the "exclusive property in the perfected improvement; "but otherwise where the suggestions embrace all "that is embodied in the patent subsequently issued "to the person to whom the suggestions were made."

Agwan Wollen Co. v. Jordan, 74 N. S. (7 Wall.) 583; 19 L. Ed. 177.

In other words, if the conception of the employer is such that a skilled mechanic employed by him can make the machine from the information imparted to him by the employer, the employer is the inventor.

3. The principle of the machine in suit is extremely simple. For this, we have the word of George Pardy

himself. In his letter to Norman Selfe of Oct. 22, 1887, [Comp. Ex. 6, Tr. p. 67] Pardy says: "Machine is a "very simple affair, simply a heavy roller adjustable to "press from 3 to 10 tons on top of a series of steel sets "held in a bar and set on top of rivets, the roller is pro- "pelled by two screws one on each side." We quite agree with Mr. Pardy. No high degree of inventive skill was required to conceive the idea, and no very great mechanical skill was necessary to make the machine.

It is conceded that Hooker first conceived the idea of riveting his pipe by machine. Pardy never gave the matter a thought, until employed by Hooker.

Now nothing could be more natural than the conception of using a roller to crush the rivets, from observing a locomotive driving wheel crush a bit of iron on the track. This Hooker testifies was what suggested the roller to him. The mandrel, or cylindrical steel bar over which the pipe is slipped, the butts of the rivets resting on its upper surface, was in daily use in his shop. The simple experiment of standing a row of rivets on the railroad track, at once showed that direct contact of the roller with the rivet ends would not do, because it bent the rivets off sideways. [Tr. pp. 94, 95.] Then came the next idea "that if we put the rivet set through the "bar that we had on the round seam stick, like this, and "let the wheel run over it, it could not get away from "it." Now this, the court perceives, gives a perpendicular thrust, without lateral motion, the rivet sets being fitted snugly in the holes in the set bar, as shown at B, B, Fig. 7, in the drawing. [Tr. p. 165.] And here we have a very pretty bit of corroboration, in a letter from Hooker to Pardy of Dec. 23, 1887 [Tr. pp. 179, 180, Compl.

Ex. 13]: "*It has always seemed to me* that the motion "to crush the rivets should be like the movement of the "die machine at the mint *you know how nicely that has to "work,* but you doubtless have investigated that move- "ment." Unfortunately we have not Pardy's letter, to which this was a reply. It would seem that Pardy had suggested some change from Hooker's plan; but Hooker sticks to his plan, which he has *always* considered best; and the machine today has the original conception, the direct thrust, working "nicely", (*i. e.,* exactly and without lateral play), of the die machine. The I beam forming a track upon which the car runs bottom side up next suggested itself, etc. etc. Mr. Hooker testifies to all this in detail [Tr. p. 94, *et seq.*], and it is not necessary to pursue the testimony further here. Suffice it to say that there is no evidence in the case which even tends to contradict Mr. Hooker's positive statement that he conceived the entire arrangement, and communicated it to Pardy.

Here is the place to dispose of young Mr. W. S. Pardy's testimony. An attempt was made to throw doubt upon Mr. Hooker's testimony by young Pardy's testimony to an interview between Hooker and George Pardy at the last of September or first of October, 1887. [Tr. pp. 40, 41, 42.] In substance his story is that he called at the office of his uncle George in the morning, and found Mr. Hooker there telling about the possibility of making a riveting machine. That in the afternoon his uncle sat down and made the sketch [Compl. Ex. 5, Tr. p. 66a]; and that no suggestions were made in his presence by Mr. Hooker to his uncle at that time in relation to the construction. the manner of construction of such

patent riveting machine. [Tr. p. 41, Q. 12.] From this, complainants' counsel draws the inference that Hooker imparted nothing to Pardy. The answer is twofold. First, there is no evidence at this point or elsewhere that this was the first consultation on the subject between the two. On the contrary, according to Hooker's uncontradicted testimony the first consultation occurred months earlier. Second, young Pardy frankly admits that Hooker had been in his uncle's office "an hour or so" before he, young Pardy, arrived. [Tr. p. 44, Q. 20.] This time was easily long enough for Hooker to have communicated this simple device to Pardy. *Non constat* from this evidence, but that Hooker had gone over the whole thing and given Pardy the data from which he made the rough sketch; and that young Pardy only got there in time to hear the general talk of the value the machine would have. Such evidence, we submit, proves nothing; and is worthless as against the detailed, circumstantial testimony of Mr. Hooker. It would certainly be a great injustice to convict Mr. Hooker of perjury and mulct him in damages, on such inconclusive testimony. It seems to us a rather wild suggestion, that Pardy, having no knowledge of the art, should have sat down after his first interview with Hooker, in which Hooker made no suggestions, and sketched a machine embodying so many features which were daily seen by Hooker in and about his factory. The thing is absurd on its face.

Before giving a brief outline of the substance of Mr. Hooker's testimony it is necessary to advert to a passage of complainants' opening brief, at page 17. Counsel here quotes Hooker: "I explained to them the result that I "wanted to accomplish and laid out that line of old prin-

"ciples, and I wanted them brought into line and work "as we had outlined it. Further than that I could not "give any instructions." Segregated as it here is, this passage gives a very warped idea of Mr. Hooker's testimony. The key to it is found in the words "as we "had outlined it." Beginning at page 94 and through page 102, Mr. Hooker describes in detail the way in which he conceived the idea of the machine, and imparted it, feature by feature to Pardy, in Los Angeles: how it was agreed, step by step, that the machine with these several features would be feasible; how Hooker made sketches and gave them to Pardy; and how, after all this information was given by Hooker, Pardy went to San Francisco and made the machine in accordance therewith. This renders the passage quoted at p. 17 perfectly clear. It is true that Hooker testified that the machine would not work, and that he and Stetlow worked over it until they made it work; and this evidence is not only not contradicted, except by striker Gowan, but is corroborated by Hooker's letters written at the time to Pardy. We have abundantly shown in point III *supra,* that Gowan's testimony that *he and Pardy* perfected the machine together was false; as Pardy warned Hooker against Gowan before ever the machine was received, Hooker agreed with the warning and "never allowed "him to handle the machine, and he never did one turn "with it". [Tr. 159, and see letters, Ex. 6, p. 175; Ex. 21, p. 186; Ex. 22, p. 187.] How the learned counsel for complainants' can claim support from these letters or Gowan, it is difficult to see.

We come finally to consider the alleged conversation

between Mr. Hooker and executor Pardy, in which it is said that Hooker told him to take the patent. [Tr. p. 24, Q. 9 *et seq.*, p. 32, Q. 3 *et seq.*]

Mr. Hooker denies that any such conversation took place. [Tr. p. 147, 148, 153, 154.] Pardy says: [Q. 13, p. 25.] "In the controversy arising I stated to Mr. "Hooker that there was two ways of settlement with the "estate; either to pay a fair and proper compensation to "it for the riveting machine spoken of, or to allow the "estate to take out a patent of it. He replied, 'you can "take out the patent.'"

"Q. State how you happened to have this conversa- "tion with Mr. Hooker? A. From George Pardy, while "living, and from certain letters in the possession of the "estate, written to him by J. D. Hooker, *I understood* "that the question of the future possession and control of "the riveting machine was unsettled, and wishing to de- "termine the matter I made the proposition that he should "control it for a fair monied compensation, or the estate "should be allowed to take out the patent upon the ma- "chine without his opposition."

Defendant's counsel duly objected to the witness's statement of his conclusion from what his brother had said to him and from the letters. Clearly this objection was well taken. No self-serving declaration of George Pardy would be admissible; and, *a fortiori,* William Pardy's interpretation of George's declarations—if George ever made any such, which we do not believe—was incompetent on any theory. But, no doubt counsel thought George Pardy's statements relevant. *Why, then, are we not given the alleged conversations between George and William, instead of William's conclusion from them?* If George Pardy had ever told William that

he, George, was the inventor of the machine, William would surely have testified to that fact. Neither Osborne, the patent solicitor and friend of George, nor Mr. Rix, of Fourth and Rix, the builders of the machine [Tr. p. 127, Q. 168] nor William Pardy his brother, nor William S. Pardy his nephew, nor Miss Hassler testified that George ever stated to them that he and not Hooker was the inventor of this machine. Nor does George claim it in the letter to his New South Wales friend. We submit that it is not in reason to suppose that if George Pardy claimed the invention as his, he would never have said so to either of these relatives or friends (especially if there was any controversy pending about it); and it is very certain that if he had made such a statement to any of them, the fact would have been testified to. Hooker's testimony [Tr. p. 115, 117] is in perfect harmony with the proven facts, and manifestly true. At pages 115, 116, he says that George Pardy asked him to take out a patent, which he declined to do at that time. Then he testifies: Q. 108 and A. "He said that he could "take out the patent in his name if I wanted. I said, " 'How can you do that?' 'Well,' he says, "If you don't " 'object there is nobody to stand in the way of it. I can " 'take out the patent in my name and assign it over to " 'you and I make my fee.' I told him we would see "about it later. He never claimed the patent to the "machine that I know of; never pretended to to me. Q. "By that you mean he never claimed to be the inventor "of the machine? A. Never. So far as I know." It was natural enough, after this conversation, that Pardy

abandoned the specifications he had commenced in his own name.

Now if Hooker did not let Pardy himself take out a patent; if Pardy never claimed the right to; is it reasonable to suppose that upon the first *and only* pretended challenge from the executor he would tell him to take one out? The court will remember that executor Pardy admits, that never, before or after this alleged conversation, did he say or write a word to Hooker upon the subject. Sight must not be lost of the fact that the executor Pardy and Miss Hassler are beneficiaries under George Pardy's will.

Again, as to the alleged alternative suggested, that Hooker should pay a monied compensation. There was nothing in that to appeal to Hooker. On his cross-examination, he says [Tr. p. 123]: Q. 136. "What agree-"ment did you have with Mr. Pardy in relation to the "payment for his services in the matter? A. Simply I "would pay him his charges for the time he was em-"ployed. Q. 137. Did he ever render you any bill for "the time that he was employed in the matter? A. No. "Q. 138. Did you ever pay him anything for the time? "Yes, sir; overpaid him." All of Mr. Hooker's accounts, vouchers and memoranda pertaining to this transaction were destroyed by fire. Some of his payments to Pardy were made by check enclosed in letters, of which some were produced by the complainants. [Tr. p. 138, 140, 141.] These letters show payments to Pardy of $1122.50, partly to meet the bills of Rix & Furth, who were making the machine. Complainants' exhibit 7 [Tr. p. 69] shows the total amount of their charges to be $961.35, leaving

a balance of $161.15 in Mr. Pardy's hands. Other sums were paid to him by Mr. Hooker personally. How much Mr. Hooker frankly admitted he could not recall. [Tr. 123, 124.] Now it must be borne in mind, that the service performed by Pardy was simply making the drawings for the builders and visiting the machine shop, from time to time, for a few minutes a day during the construction of the machine [Tr. 124] for a period of three months. The fact that Pardy never made any demand on Hooker for any further payments, during the year and eight months after he sent the machine to Los Angeles, is the strongest kind of evidence that he had been fully paid. So, we say, there was no reason whatever, why Hooker should recognize any demand by executor Pardy for a "monied compensation." We do not need to charge William Pardy and Miss Hassler with deliberate perjury as to this alleged interview; but can content ourselves with suggesting that eighteen years after the date named they have naturally hunted "hastily through the "pigeon-holes of memory where unpleasant or damag-"ing truths are supposed to be stored away" [complainants' brief, p. 13]; and, the wish being father to the thought, persuaded themselves to recall this strange and unnatural conversation.

POINT V.

The judgment and decree of the learned Circuit Court should be affirmed.

George Pardy was for forty years a friend of John D. Hooker, whom, the record shows, Mr. Hooker had constantly befriended, and was befriending at the time of the transaction which is involved in this suit. The court is asked to find, upon the testimony of witnesses given eighteen years after the events of which they swear, and the principal one of whom was an enemy to Mr. Hooker and his machine and discharged for leading a strike in Mr. Hooker's factory at the very time he pretends to have been aiding Pardy to perfect the machine; and all of whom are contradicted by letters written as a part of the *res gestae*, and by the inherent nature of the case; that John D. Hooker has committed deliberate perjury, to protect himself in robbing the estate of his old friend. The learned judge at circuit, after argument and re-argument of the case found no ground for such decision. We submit that he was clearly right.

Respectfully submitted,

J. W. McKinley,

Solicitor for Appellee.

J. W. McKinley and

Alexander H. Van Cott,

Of Counsel.